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Jean Michel Josselin (CREM - CNRS)
Alain Marciano
(University of Reims – CNRS – EconomiX – IDEP)

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The political economy of European federalism

Jean-Michel Josselin, Université de Rennes 1 and Centre National de la Recherche Scientifique : CREM[*]

Alain Marciano, Université de Reims Champagne Ardenne (OMI-EDJ), and Centre National de la Recherche Scientifique: EconomiX and IDEP[°]

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Abstract: In spite of the clear objective assigned to the integration process in the 1950s, the institutional status of the European Union remains ambiguous and uneasy to define. The argument that we present in this article is that Europe has always hesitated between two forms of federalism. We use an agency framework and demonstrate that before the landmark cases *Van Gend en Loos* and *Costa v. E.N.E.L.*, the European Union is mainly a confederation but it already contains elements of a federation. Afterwards, the institutional structure of the Union evolves towards a more centralised federalism but still shows lasting elements of a confederation.

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[*] Jean-Michel Josselin, Université de Rennes 1, Faculté des Sciences Economiques, 7, place Hoche, CS 86514, F-35065 Rennes cédex France, e-mail Jean-Michel.Josselin@univ-rennes1.fr

[°] Alain Marciano, Université de Reims Champagne Ardenne, Faculté des Sciences Economiques, 57 bis, rue Pierre Taittinger, F-51096 Reims cédex France, e-mail a.marciano@wanadoo.fr

The political economy of European federalism

Section 1 Introduction

The unlucky Draft Treaty presenting a Constitution for Europe, first exposed in October 2002, then adopted by the plenary session of the European Convention on 13 June 2003 is a further contribution to the fifty year old ongoing debate about the institutional framework of the European «Union». Indeed, as soon as the 1950s, the debate was launched by clear statements about the necessity to develop a federal-like European Union. For instance, Jean Monnet explicitly stipulated that the first supranational integrated community should be a foundation stone and a first step towards a «federation». The same objective was also referred to several times by Maurice Schuman when exposing his plan in May 1950. However, after so many intergovernmental conferences and despite an impressive literature has been devoted to the question, the effective constitutional status of the European Union remains uneasy to define. Europe «has charted its own brand of constitutional federalism» (Weiler, 1999, p. 17), a model that admittedly «does not correspond to the theorist's model for political federalism» (Buchanan, 1996: 253). Accordingly, the «federalist nature [of the Union] has yet to be established» (Murkens, 2002, p. 1). In other words, question remains: What does the European model of federalism consist in? Following the methodology put forward by Inman and Rubinfeld (1997), this article proposes a contribution to this debate through a political economy analysis of the way prerogatives are assigned between the different institutional levels in Europe.

Our argumentation develops within the theoretical framework of the principal-agent relationship. The specific problem of European integration can be analysed from the normative perspective of the design of an optimal constitutional agency contract. In this article, we rather adopt a positive perspective. Thus, we refer to a simple but general model of federalism to describe the agency relationships that unite the different actors who participate in the agency constitutional contracts and the tasks that are delegated or assigned to these actors. More precisely, we assume that the citizens are in the situation of the principals and delegate tasks to several agents (national, infra- and supra-national institutions). Two forms of federalism can then be

distinguished. First, in a confederate framework the member states are the principals and they delegate a very limited number of tasks to the central institutions; the assignment of prerogatives rests on bargaining. Second, a federation characterises a constitutional assignment of prerogatives in which the central institutions are in the position of the principals and the member states are their agents.

When applied to the European situation, this framework allows us to show that the assignment of prerogatives between the different institutional levels in Europe is a mix between a confederation (decentralised federalism) and (centralised) federalism. This argument differs from the two usual statements about European federalism. On the one hand, some observe that «Europe is closer to the confederal than it is to the federal» model (Weiler, 1999: 1). On the other hand, many consider that Europe has evolved from a decentralised to a centralised federalism (Inman and Rubinfeld, 2002). Truly, the Europe Union is more centralised today that it was a few years ago. Furthermore, it is also obvious that, to use the words of Piris, legal adviser of the Council of the European Union and of the intergovernmental conferences which negotiated and adopted the Treaties of Maastricht and Amsterdam, the European integration process «has not followed any pre-established Cartesian model» (2002, p. 43). On the contrary, it has been guided by pragmatism, the pressures of (both national and international) interest groups and constrained by political agendas. However, the European integration process nonetheless appears to be quite consistent: between 1950 and 2000, the European institutions have always presented, at the same time, federal features and characteristics of a confederation. This is the argument we defend in this article.

From this perspective, our purpose is not simply to show that a process of centralisation indeed took place. We rather stress that, within this process, from the 1950s until the end of the 20th century, the European institutional structure has always been characterised by ambiguity, always hesitating between a confederation and a federation. To illuminate these hesitations we utilise the landmark cases – *Van Gend en Loos* and *Costa v. E.N.E.L* – to distinguish two periods between 1950 and 2000[1]. This helps us to show that before these judgements, the European Union is mainly a

[1] From this perspective, our argument is different from that of Paul Taylor (1975) who argues that the period from 1949 to 1955 corresponds to the federal phase ; from 1955 to1969, the Neofunctional phase and after 1969, the confederal phase.

confederation but it already contains elements of a federation. This is discussed in section 2. Then, in section 3, we show that the institutional structure of the Union evolves towards a more centralised federalism but still shows lasting elements of a confederation. Section 4 summarizes our argument and provides concluding remarks.

Section 2 A mostly confederate system, nevertheless hybrid (1950-1962)

Political entrepreneurs soon intend like Jean Monnet soon intend to gather the European nation states into a supranational and federal entity. However, they know perfectly well that the not so distant conflict and the «age-old opposition of France and Germany» (Schuman, 1950) are crucial obstacles making the immediate achievement of this objective impossible. It is then admitted that «Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a *de facto* solidarity» (Schuman, 1950). Furthermore, many are opposed to the creation of a European federation. They rather prefer the building of a decentralised confederation in which the member states would keep the European institutions under their control. For these reasons, the attempts made to find a politically acceptable road towards integration result in a compromise which breeds a hybrid system. Neither a confederation nor a federation, the European institutions of that time display characteristics of a confederacy (2.1) as well as non negligible features of a federation (2.2).

2. 1 A confederation at work

Europe is primarily conceived as a confederation. This is not only evidenced by the opinions expressed in the debates at that time but also illustrated by the nature of the agreement giving birth to the first European treaties founding the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community. Thus, the corresponding «European contract» is not designed by an autonomous and original constituent power. Certainly, it may be possible to interpret the ratification procedures of the different European treaties by the national legislatures as constituent acts. However, nothing indicates that ratification does amount to exercising a real constituent power. As a corollary, the different treaties are not rooted in decisions or choices directly made by the citizens of the European nation

states. On the contrary, citizens are absent (or only indirectly involved) in the process of integration that establishes the European institutions. For instance, the ECSC Treaty is explicitly concluded in the names of Heads of states. Nothing is thus said about the level of agency linking the states and their own citizens. The Treaties only formalise the level of agency contract that organises the interactions between the states and the European institutions. More precisely, the European institutional order that then results from these treaties can be described as an agency relationship which takes place between the member states – in the position of the principals – and the European supranational institutions – their agents.

Furthermore, one must also note two elements that reveal more clearly that the nation states are the principals. First, they control the delegation of prerogatives. Thus, the European institutions form the framework in which negotiations, when needed, will take place: central institutions (here, the European Community) are granted with certain competences, the extent of which is determined through diplomatic bargaining during intergovernmental conferences mainly. This is a clear illustration of a confederation contract: prerogatives are not permanently assigned through a constitution to the higher institutional, in this case European, level. To the contrary, when member states prove to be inefficient in dealing with a specific problem, they bargain with each other in order to know which tasks will be delegated to the central institutions. Second, the tasks that are delegated to the European institutions remain limited. This is strikingly but clearly put forward by a 1957 decision of the European Court of Justice (joint cases 7/56 & 3-7/57, Dineke Algera et al. v. Common Assembly of the European Steel and Coal Community, 1957, E.C.R 69: 82). Advocate General Maurice Lagrange stresses that the ECSC treaty is «based upon delegation» from the member states to the European institutions. Lagrange then insists that the Treaty only allows a «limited [transfer of] authority» to the supranational institutions, only with «strictly defined purpose[s]» because sovereignty, or in technical terms principalship, remains in the hands of the member states.

The early European institutional order undoubtedly possesses characteristics of a confederation. Nevertheless, the set of European Treaties does not provide a perfect example of the agency relationships of a confederation.

2. 2 A federation in gestation

To illustrate the federal dimension of the European institutions, we emphasize two crucial elements: first, the limited role of bargaining in the decision-making procedures and in the assignment of prerogatives; and second the existence of regulations.

2.2.1 Bargaining and constitutional assignment of prerogatives

The assignment of prerogatives between the different institutional levels, the central issue of federalism, is undoubtedly different in a confederation and in a federation. As it is well known, bargaining and negotiation prevail in the functioning of a confederation. At best, one may even argue that no collective decision is made and no task is attributed to the central institutions outside this process. Certainly, as a general rule, bargaining indeed played an important role in the assignment and reassignment of prerogatives among the national and supra-national levels in Europe. However, the functioning of the European institutions only partially follows the constraints of bargaining.

Firstly, at the central European level, some decisions can be made directly by the agents of the member states, outside any bargaining framework. Some institutions are indeed granted with prerogatives that can be labelled «constitutional» since there are not likely to be controlled by the member states. For instance, the European Coal and Steel Community treaty (Article 8) establishes a High Authority whose prerogatives are almost those of a principal. As long as it behaves within the legal framework of the Treaty and according to the objectives assigned by the Treaty, the High Authority benefits from «a certain independence». This is stated by a preliminary ruling of the European Court of Justice in *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* (Case 8-55) and stated again in *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community* (Case 9-56). These judgements are significant for many reasons. First, one cannot but note the already important role of the Court: although in the position of an agent of the member states, it nonetheless makes a decision about the prerogatives of another agent. Obviously, if the member states are the principals, one agent would certainly have no right to delineate the prerogatives of other agents. Second, the Court claims that the High Authority has the right to choose its own agents and, moreover,

that this very capacity of the High Authority to act as a principal is not subject to the control of the member states: It depends on the legitimacy that the High Authority itself attributes to this delegation. In other words, even if the member states as the principals and «masters of the covenant» retain formal authority, there are instances when real authority lie*s in the hands of their agents*.

Secondly, even if they continue to play a role, bargaining and negotiation are progressively replaced by a constitutional assignment of prerogatives. The European Union indeed evolves from a confederate international legal order to a more centralised – federal – constitutional order. This evolution implies a modification in the way the set of original treaties (ECSC, EEC, and EURATOM) are perceived or interpreted by the European institutions, among which the European Court of Justice. The latter soon considers as one of its responsibilities the task of providing an interpretation of the treaties, according to the «presumed intention of the authors» of the Treaties, as it is mentioned in *Fédération Charbonnière de Belgique* case, at the end of the 1950s. The need for interpretation is a non negligible thing. More important are the constitutional consequences that it implies. In effect, the insistence on the need for interpretation that is necessarily associated with judicial decision-making reveals the belief in the existence of «a body of law – a *corpus iuris* – which the lawgiver is presumed to intend should be complete and coherent» (Edwards, 1997, p. 317). The existence of this framework is assumed in 1956, when the Court argues that the treaty of Rome can be considered as the «charter of the Community» (*Fédération Charbonnière de Belgique*, op. cit.). This court case consistently connects the need for interpretation in judicial decision making and the necessity of a legal background or framework within which interpretation is possible.

2.2.2 Regulations, community law and the role of the ECJ

The European institutions are not only «independent» enough to delineate the set of their own competencies but also to define some of those of the member states and to impose some choices on the principals. This capacity relates to the second federal feature that characterises the Treaty of Rome, namely the role of regulations. Article 189 of the Treaty of Rome acknowledges the capacity of the European institutions to provide specific rules that are «European rules» and can thus be considered as the first elements of the Community law.

Article 189 corresponds to a federal conception of rules; a conception in which rules are pure (supra-national) public goods as in a federation, rather than as local (national) public goods as it is in a confederation. This implies that the European Community, even if viewed as a confederation, is also set as a federation. Interestingly, the meaning of regulations was particularly rapidly – as soon as 1956 – understood and acknowledged by the Court of Justice (see Lagrange in *Fédération Charbonnière de Belgique*, op. cit.).

Now, the existence of a Community law – laws and legal rules that are not only common to the member states but produced by the European institutions themselves – implies that there are two levels of rules, national and supranational. This raises the question of the way these two levels articulate with each other. Is there a hierarchy between national and supranational rules? Are they substitutable or complementary? These are the questions to which the Court provides answers in 1960. In the not often quoted *Humblet v. Belgium* case (case 6/60, E.C.R., 559: 569), the Court refers to what was then Article 86 of the ECSC Treaty to argue that member states are obliged to withdraw decisions that are «contrary to Community law» and that the latter directly applies in the member states as soon as they have ratified the Treaty. The corollary to this statement is that there is a hierarchy between the Community law and national law, the former having precedence over the latter.

Accordingly, if there exist legal rules viewed as pure public goods and because of the possible conflicts that can arise between national and supra-national rules, the logical and necessary consequence is that these rules have to be controlled at the highest institutional level, even at the cost of possibly as much centralization as in a unitary framework. This is consistent with the creation and existence and even functioning of a European Court of Justice; in other words, the creation of the Court of Justice is significant of the federal dimension of the European institutions. One may argue that a Supreme Court is consistent with a confederate framework to the extent that it remains an agent to which the sovereign member states, acting as confederate principals, explicitly delegate some limited and defined tasks. However, in Europe, the Court was created as a means to check the other components of government: in particular, to verify that the secondary law – legislation proposed by the Commission and enacted by Council and Parliament – fits the frame of the primary law. This does not correspond to a confederation, a regime in which the behaviours of the central

institutions are supposedly controlled by the member states through bargaining and veto power. Thus, to rely on a Court as a means to control the agents refers to a federal structure rather than to a confederation. This is no surprise if the Court itself interprets its role as that of the supreme court of a federal system (see Lagrange in *Fédération Charbonnière de Belgique*, op. cit.).

Obviously, the way prerogatives are assigned to the national and supra-national levels does not receive the same interpretation in a confederation and in a federation. That two possible frameworks exist and that the Court considers itself as part of a federation indicates that a «federal turn» will be taken, though it will not be complete.

Section 3 The road to partial federalisation (1963-2000)

The road to federalism is signposted by judgments of the ECJ. These judgments expand the prerogatives of the European institutions, including the Court itself (as shown by the analysis of the preliminary reference article, for instance; see Voigt, 2003; Tridimas and Tridimas, 2004). The decisions made by the Court also contribute to progressively change the institutional structure of the European Union, turning it from a confederation into a more centralised and federal regime. This is what has been stressed, for instance, by Lenaerts who writes that the Court produced a «series of rulings that helped turn a public-international-law construction into a truly novel legal order containing the essence of a federal system» (1992, 94). But, and this is an interesting feature of the European «model» of federalism, the Court only proceeds to a partial federalisation of the European confederation, which proves to be resilient.

3. 1 Ongoing federalisation

The premises of the transformation of the European community from a confederate to a federation can be associated with decisions made by the Court in the second half of the 1950s. However, the arguments developed by the ECJ were not fully «understandable» at that time and the related changes the court cases implied remain implicit. The reason is that the role of the Court was interpreted within the context of an international legal order. The «federal turn» could be perceptible only within the legal framework of a federation. This is the reason why the move towards a federation is usually associated with the preliminary decisions made in landmark judgements that

are *Van Gend & Loos v. Nederlandse Administratie der Berlastingen* (case 26/62, 1963, E.C.R 1) and *Flaminio Costa v. E.N.E.L.* (Case 6/64, 1964, E.C.R. 585). These really important cases transform the existing legal order, turning it from an international to a constitutional legal order. As a consequence, the prerogatives of the European institutions are constitutionalised but they also expand.

3.1.1 Towards a constitutional assignment of prerogatives

The role of bargaining in the assignment and re-assignment of prerogatives was already only partial in the 1950s. As we have seen before, some provisions granted once-and-for-all prerogatives to the European institutions. The latter could then make decisions outside the procedure of intergovernmental negotiations. A more important change can be associated with *Van Gend & Loos*. The court decision made in *Van Gend & Loos* rests on the argument that the Treaty of Rome «is more than an agreement which merely creates mutual obligations between the contracting States». Would the *Treaty* have only created *mutual obligations between the contracting States*, it would only have been an international treaty and an *agreement* between the members of a confederation. In arguing that it *is more than* that, the Court insists that the European Union is not an international legal order or a confederation. It belongs to a legal category quite different from the one – international public law – initially conceived during the early stages of the Community. Europe is now considered, at least by the Court, as a constitutional legal order.

Initiated in the early sixties, the process eventually leads to the definition of the treaties as the European «basic constitutional charter» (case 294/83, *Parti écologiste «Les Verts» v. European Parliament*, 1986, E.C.R. 1339: 1365). To consider that the Treaties do not only consist in a legal background providing references for judicial interpretation but also form the European constitution means that the assignment of prerogatives should no longer result from interstate bargaining. The 1986 Luxembourg compromise completes the process. Decision making is at that time based on the rule of unanimity. The Luxembourg compromise brings about incentives to shift from bargain federalism to a more centralized vision.

3.1.2 The expanding attributes of a federation

From the perspective of economic theory, the argumentation developed by the Court in the *Van Gend en Loos* case obviously consists in re-stating that European rules are pure public goods. It also plays an important role in confirming the hierarchy between national laws and Community obligations. In effect, with *Van Gend en Loos*, the Court argues that the legal order is common to all the member states of the Union and therefore cannot be restricted of the limits of the nation states. Thus, the «municipal law» common to the member states of the Union – the Community law – must apply directly and uniformly within each country member of the Union. Furthermore, it means that national legislatures and judiciaries are only part of this legal order.

As a corollary, this claim also results in a change in the agency relationship underlying the European institutions as well as a change in the respective prerogatives assigned to the different parties to the contract. From the perspective of international law a supranational government remains subordinated to its creators; the reverse occurs in a constitutional order where the constituent units subordinate themselves to their creation. This is explicitly put forward by the Court in another landmark case of the 1960s, namely *Costa v. E.N.E.L.* In this case, the ECJ clearly establishes the institutions of the European Union – among which the Court itself – in the position of a principal. The European Court of Justice does not only establish itself in the position of the principal but also assumes the responsibilities of its new function.

This evolution is all the more visible that it implies a decrease in the prerogatives of the original principals, the member states. One example is given by the seemingly disappearance of the principle of enumerated powers (Weiler, 1991). As is unambiguously put in a decision of the ECJ in 1967, «When the member states conferred powers on the community institutions, they agreed to a corresponding limitations in their sovereign rights» (Judgment of the Court of 13 December 1967, *Firma Max Neumann v Hauptzollamt Hof/Saale*; *Reference for a preliminary ruling: Bundesfinanzhof – Germany*; Case 17-67). Another example is provided by the introduction of the co-decision procedure in the Amsterdam treaty. This procedure is viewed as a way to check and balance the power of the Commission and Parliament and to encourage competition between them. It also implies a shift of power from the member states to the European level, thereby increasing the federal centralisation of the Union.

Thus, as a result from this evolution, the respective role of the member states and the upper, supra-national, level of government institutions change. The European institutions acquire the position of the principal of the member states, their agents. There nevertheless remain some confederate features. Indeed, the move towards a federation is only partial.

3. 2 Some lasting attributes of a confederation

The implementation of the principle of subsidiarity (as introduced by the Maastricht treaty (Article 3B) and specified by the treaty of Amsterdam (Article 5)) can be interpreted from the perspective of the existence of lasting attributes of a confederation. Thus, even if the European institution structure becomes more and more federal and centralised, the constitutional framework developed in the European Union still largely includes elements of a confederation. The European Court of Justice contributes to reinforce the hybrid aspect of the European institutional structure. Indeed, the «judicial activism» of the Court only partially modifies the agency relationship, by adding a second source of principalship in the Union, namely the citizens. A complete shift from a confederation to a federation would have required to straightforwardly replace the principalship of the member states vis-à-vis the Union by that of the European citizens. This partial transformation has its origin in the *Humblet* and, above all, in the *Van Gend en Loos* cases. The Court thus states that the Community is «a new legal order of international law […] the subjects of which comprise not only the Member States, but also their nationals».

As a consequence, both confederate and federate features coexist in the judicial landscape. Member states are the primary agents of the citizens when subsidiarity prevails and is implemented (when member states demonstrate that they can better achieve certain goals), whereas they are the secondary agents of the European level when Court decisions emphasize the duty of member states vis-à-vis European decisions. An example of it is the 1991 *Francovich* case (*Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, joined cases C-6/90 and C-9/90, E.C.R 1991) by which individuals can claim compensation after suffering damage resulting from a lack of implementation of a European directive at the state level. In the first case, the confederate setting prevails while the second case promotes centralized federalism.

Section 4 Conclusion

Though citizens have been formally part of the «European covenant» since the *Van Gend en Loos* case, the architecture of principal-agent relationships in the Union remains unclear. On the one hand, the activism of the Court often tends to foster the secondary principalship of the Union: In this acceptation, citizens are members of the Union before being members of a state. This is the federal side. On the other hand, subsidiarity as it is defined in the treaties still provides a rationale for member states to claim secondary principalship over the Union. Here, citizens are members of a state before being members of the Union. This is the confederal side. The co-existence of two possible agency settings obviously has important consequences on the assignment of rights between the states and the supranational power. It also contributes to keep the institutional form of the European Union as a hybrid (con)federation.

Section 5 References

Buchanan, James M. (1996) «Europe as a social reality». Constitutional Political Economy 7: 253-6.

Edward, David A. O. (1997) «The role and relevance of the civil law tradition in the work of the European Court of Justice», in D. L. Carey and R. Zimmerman (eds), *Civilian tradition and the state law: Aberdeen Quincentenary Essays*, Berlin, Duncker and Humboldt.

Inman, Robert P. and Daniel L. Rubinfeld. (1997) «Rethinking federalism». Journal of Economic Perspectives 11: 43-64.

Inman, Robert P. and Daniel L. Rubinfeld. (2002) «Subsidiarity, governance, and EU economic policy», CESifo forum, 4: 3-11.

Leanerts, Koen. (1992) «Constitutionalism and the many faces of federalism». American Journal of Comparative law 38.

Murkens, Jo. (2002). «The Integrative Function of a European Constitution (Discussion of Christian Dorau: *Die Verfassungsfrage der Europäischen Union**)», *German Law Journal*, 2 (February) - European & International Law

Piris, Jean-Claude. (2000). «Does the European Union have a constitution? Does it need one?». Jean Monnet Working Paper, Harvard Law School.

Taylor, Paul. (1975). «The Politics of the European Communities: the Confederal Phase», *World Politics*, 27 (3), pp. 336-360.

Tridimas, George and Tridimas, Takis. (2004). «National courts and the European Court of Justice: a public choice analysis of the preliminary reference procedure», *International Review of Law and Economics*, 24 (2), pp. 125-145.

Voigt, Stefan. (2003) «Iudex Calculat: The ECJ's Quest for Power», *German Working Papers in Law and Economics*: Vol. 2003: Article 14, http://www.bepress.com/gwp/default/vol2003/iss1/art14.

Weiler, Joseph H. (1991) «The transformation of Europe». Yale Law Journal 100: 2410-31.

Weiler, Joseph H. (1999) «Federalism and constitutionalism: Europe»s Sonderweg», Jean Monnet Working Paper, Harvard Law School.

Weiler, Joseph H. and Ulrich R. Halpern (1996) «The autonomy of the community legal order. Through the looking glass», Harvard International Law Journal 37.